



## Committee report

Committee	<b>CABINET</b>
Date:	<b>TUESDAY, 22 MAY 2012</b>
Title	<b>APPROVAL FOR THE DISPOSAL OF VENTNOR BOTANIC GARDEN TO VENTNOR BOTANIC GARDEN COMMUNITY INTEREST COMPANY</b>
Report of	<b>THE DEPUTY LEADER AND CABINET MEMBER FOR THE ECONOMY AND THE ENVIRONMENT AND THE CABINET MEMBER FOR FIRE, CULTURE AND RESIDENT SERVICES</b>

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### EXECUTIVE SUMMARY

1. This paper seeks the Council's acceptance of terms agreed with Ventnor Botanic Garden Community Interest Company (VBG CIC), (the preferred bidder) for its acquisition of the Botanic Gardens on a 125 year leasehold basis. Principal amongst these terms are the provision of a maximum grant of £200,000 by the Council for capital improvements to the infrastructure of the Garden and an undertaking by VBG CIC to spend circa £800,000 during the first five years of its occupation. Additionally the council will retain an ongoing annual revenue obligation of £24,000 representing its contribution to the pension costs of the staff transferring to the VBG CIC under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). If the council proceeds with the disposal it will also benefit from the long term revenue savings detailed in this report.

### OUTCOMES

2. In agreeing to these terms the Council will achieve its desired outcomes of:-
  - a) The Garden continuing to develop as a centre of botanic excellence, scientific importance and a tourist destination with an international reputation for its exceptional location, presentation and interpretation;
  - b) The Garden running as a successful enterprise run for the benefit of the community, with profits re-invested to achieve Outcome (c);
  - c) Achieving a significant annual revenue saving for the Council;
  - d) Reducing the council's future liability to maintain the Garden's physical assets;
  - e) Approving the grant of ground lease by the council to the preferred bidder;

- f) Safeguarding a significant public asset by identifying a suitably qualified organisation, to which management responsibility for the Garden may be transferred.

## BACKGROUND

3. The Garden occupies 29 acres of land to the north and south of the Undercliff Drive in Ventnor. The extent of the Garden is defined by the hatching shown on the plan at Appendix A.
4. The area outlined is owned freehold by the council and features a Listed Landscape (a listing and classification system for historic parks and gardens similar to that used for listed buildings) and a botanic collection, which has international importance.
5. The Garden's Visitor Centre was built with a substantial grant from the Millennium Commission (now the Big Lottery, or BIG). The terms of the grant apply to the whole Garden and any disposal of the site must secure consent from BIG.
6. Failure to secure this consent will result in a fixed-percentage clawback of the original grant. This could amount £1million, or more. Clawback would not apply if the council retains the freehold of the site, with consequent liability for the grant's ongoing conditions to 2077. For this reason disposal is recommended by a 125-year ground lease, with the freehold retained by the council.
7. On 7 December 2010, Cabinet decided to explore ways in which the Garden could be managed differently, to realise a saving to the council in the order of £300,000 each year from April 2012.
8. In September 2011, a Cabinet Member decision was taken under delegated powers, to invite expressions of interest from third parties to acquire the Garden either on freehold or leasehold terms.
9. Eighteen expressions of interest were received, resulting in two bids. These were evaluated by a panel, comprising council officers, local ward councillors, Ventnor Town Council representatives, plus local business people, the Friends' Society and Garden staff. This evaluation resulted in the selection of VBG CIC as the preferred bidder. This was confirmed by formal officer delegated decision.
10. Appendix B shows the bid document from the Ventnor Botanic Garden Community Interest Company (VBG CIC). The bid formed the basis of negotiations between council officers and the lead Director of VBG CIC. This report details the successful conclusion of those negotiations.
11. The proposed transaction will achieve:
  - disposal of management accountability for a key council asset, which will remain and develop as a visitor destination of choice;

- the involvement of both the Royal Botanic Gardens, Kew and the Tresco sub-tropical gardens (Isles of Scilly, Duchy of Cornwall) in safeguarding the botanical integrity of the Garden;
  - the acceptance by VBG CIC of the liabilities on the site, under a full repairing and insuring lease, albeit that for the items identified in Appendix D the council will potentially make a contribution to repairs from a proposed ring fenced provision of £200k;
  - investment estimated at almost £800,000 in the Garden by VBG CIC in the first five years of the lease;
  - BIG's consent to the continued business case to deliver the aims and objectives of the original grant.
12. To enable VBG CIC to take on the liabilities on the site, it is proposed that the council sets aside a one-off ring-fenced provision of £200,000. This would be made available to VBG CIC, on the presentation of approved invoices relating to agreed repair/restoration works to a defined number of outbuildings at the Garden. Specifically, the expenditure should be used to repair and refurbish the following structures:-
- the property on the site, known as "Signal Point",
  - the Temperate House,
  - the former Smugglers' Museum and associated tunnels
  - the remaining Victorian foundations and subways relating to the site of the former Royal Hospital within the grounds.
13. Ventnor Cricket club is shown cross hatched in appendix A and is excluded from the proposed transfer.
14. These funds would allow major capital projects to be undertaken more swiftly than might otherwise have been possible. They will also allow business plan set out in Appendix B to be delivered in a timely fashion, helping to protect the provision of the Botanic Garden for Island residents and visitors. This ring-fenced provision would be limited in time to five years. This would allow VBG CIC five years to draw down sums of money from the provision. Any unused sums remaining at the deadline date would no longer be available to VBG CIC. The draw-down criteria, by which expenditure approvals would be secured, are set out below:-
- a. Expenditure solely on those IWC-owned premises at Ventnor Botanic Garden, as specified in paragraph 12 above
  - b. Expenditure solely to be utilised to facilitate capital improvement works including but not exclusively the following activity: restoration; refurbishment and repair. This may include electrical wiring, plumbing, roofing, structural repairs, plastering, replacement of windows or doors, insulation and associated building works. This expenditure is required to be approved by IWC prior to the ordering of any works.
  - c. Payments will be made to VBG CIC, on production of valid invoices and subsequent to agreement with the council that the works are compliant with elements (a) and (b) above.

## STRATEGIC CONTEXT

15. The recommendation supports the Eco Island Sustainable Community Strategy themes *thriving Island* (because the Garden will be run by a new community-based enterprise) and *healthy and supportive Island* (because the Garden will be offering increased volunteering opportunities within the community).
16. The rationalisation of the council's property assets forms part of the 'Delivering of Budget Savings through Changed Service Provision' priority within the council's Corporate Plan.
17. This proposal is also likely to support the 'Regeneration and the Economy' corporate objective of the council, because the successful bidder is more likely to make additional investment in the Garden than the council is in the current financial climate.

## CONSULTATION

18. The content of this report has been shared with the Friends Society, the relevant ward councillors, the relevant Cabinet Members, council officers and Garden staff. This report has also been shared with VBG CIC.

## FINANCIAL / BUDGET IMPLICATIONS

19. The net controllable revenue budget in 2011-12 for running the garden reduced to £193,553 after identifying various efficiency savings over the past 2-3 years. Minimising this remaining subsidy forms the basis of the ongoing savings from 2012-13.
20. Under Section 123 of the Local Government Act, the council is obliged to obtain best consideration for the disposal of land and buildings. The current financial position for the council requires the local authority to balance differing arguments regarding the meaning of "best consideration" in this instance. The council could receive a price for the leasehold interest in the site (and therefore surrender a set proportion to the Big Lottery (BIG) in fulfilment of clawback clauses in a Millennium Commission grant). However, the council could transfer the garden to a third party on a peppercorn long leasehold, and retain the liability for the BIG grant, without triggering the potential clawback clause. The decision has been taken that, in this instance, "best consideration" means limiting the council's ongoing financial liabilities. The long leasehold achieves this disposal, which is why this is the recommended course of action.
21. If the council were to undertake capital works on the premises itemised in paragraph 12 above, estimates of the costs involved suggest that such works would cost significantly in excess of the £200,000 proposed for the discrete cost centre in the council's accounts. The council would operate this discrete account by setting aside the agreed sum and entering into a legally-binding agreement with VBG CIC which established the duration and draw-down criteria for the account's payment of expenditure by VBG CIC.
22. The council's capital resources are limited and its main capital commitments, apart from schools and transport, have to be funded by capital receipts from the disposal of

assets, or from prudential borrowing. In considering the VBG CIC proposal, the council must weigh local community benefit against any capital receipt that could be gained (such as the potential sale price of Signal Point). The value of this site has been estimated to be in the region of £270,000.

23. If the council decides to establish a time-limited provision it will need to provide a one-off sum of £200,000. It is proposed that this is met by carrying over £200,000 from the overall council budget savings/underspends achieved in 2011/12. This would allow VBG CIC to underwrite the Garden's ongoing development and enable the Council to help safeguard a significant public asset.
24. The staff (who are currently members of the Isle of Wight Council Pension Fund) as part of the TUPE transfer are entitled to either retain their membership of the Local Government Pension scheme or be provided by their new employer with a comparable pension arrangement. VBG CIC has indicated that it is not in a position to offer a comparable pension scheme and therefore would be seeking to become an admitted body to the Isle of Wight Council pension fund so that transferred staff would continue with current pension arrangements. This would not be extended to any members of staff who were recruited by VBG CIC after the date of transfer.
25. There are seven staff who would be subject to TUPE transfer and are members of the Local Government Pension Scheme. At the point of transfer the accrued pension liabilities of those staff will be met by the council and have been assessed by the fund's Actuary as £448,000. This amount will be covered by the existing funding within the Isle of Wight Council Pension Fund, with any shortfall being met by the council through an employer contribution.
26. The VBG CIC would become the employer of the staff and be an admitted body to the Isle of Wight Council Pension Fund. The employees would continue to be members of the fund and their contributions will continue to be paid into the fund. VBG CIC would be responsible for the employer contributions.
27. Currently the council employer rate is 22% of pay. In a normal outsourcing, where an external supplier is contracted to deliver a service at a tendered cost, the employer pension costs would form part of the contract. In effect, the cost would be included within the contract sum paid by the council and the Contractor would pay it into the fund.
28. Under the arrangements with VBG CIC, however, the council will not be paying for a service and therefore there is a limited ability by the trust to pay employer contributions at the full level (some £33,000 p.a.).
29. In addition there are a number of variables that will impact on the accrued and future pension liabilities that may increase the employer rates.
30. In order for the transfer to the CIC to be viable it is proposed that the employer rate that the CIC pay is capped at 6% of pay. This means that the current shortfall of 16 % (£24,000) will need to continue to be met by the council and provided for within the residual budget for Ventnor Botanic Gardens. In addition, as has been the case with other similar transfers, the council will retain the risk of factors that they would have had to meet if the staff had remained with the council and are outside of the control of

the new admitted body such as investment performance, increases in longevity, death in service, inflation.

31. The new admitted body would be responsible for any additional pension liabilities as a result of their actions such as pay increases above the norm, early retirements, redundancies and any discretions they agree that are allowed under the scheme.
32. The arrangements would be subject to a formal admission agreement.
33. In overall terms the council needs to balance the benefits of the proposed transfer in the outcomes that will be achieved in respect of the development and maintenance of the gardens, the substantial reduction of its on-going revenue costs and reduction in its likely capital commitments against a one-off cost of £200,000, the potential capital receipt foregone any potential BIG clawback payment and the on-going pension liabilities it will still retain. If the transfer does not go ahead then it is unlikely that the full revenue savings will be made and the Council will retain the full pension liabilities in any case.

#### LEGAL IMPLICATIONS

34. The council has the power to dispose of its property under Section 123 of the Local Government Act 1972 in any manner it wishes for the best consideration that can reasonably be obtained. This does not necessarily mean the highest price achievable, as it can be obtained by means other than purely monetary consideration, such as the additional community benefits that the transaction may generate, whilst observing the council's fiduciary duties to the public generally, and protecting council interests and service delivery.
35. In seeking to dispose of the Garden, the council has undertaken an open, fair and transparent competitive process to secure a preferred bidder.
36. The disposal of the Garden will trigger a transfer of persons employed there in accordance with The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Any TUPE implications must be carefully considered and TUPE must be complied with.
37. The Council is the freehold owner of Ventnor Botanic Gardens and can dispose of the leasehold interest in this property.
38. The Lease includes a restriction that requires the property to be used as a garden for the centre of botanic excellence and a tourist destination with an international reputation.
39. The Lease also contains provisions for dealing with the property during the term of the lease. In the event that the tenant wished to dispose of the lease of the whole premises it must be offered to the Isle of Wight Council (for no monies). Should the council not wish to take the property, then a disposal to a third party may take place, subject to the restrictions in the lease, and with the approval of the Council and BIG (if still applicable).

## EQUALITY AND DIVERSITY

40. The council as a public body is subject to general and specific duties under equality and diversity legislation and as such has a duty to impact assess its service, policies/strategies and decisions with regards to diversity legislation and the nine “protected characteristics” (age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion, sex and sexual orientation).
41. Equality Impact Assessments (EIAs) have been undertaken to ensure that the statutory equality duties are given due regard and wherever possible, any identified negative impacts are either avoided, or mitigated against in the Action Plans. Two EIAs have been carried out: one for the impact on the visitors who may visit the Garden; one for the impact on staff and volunteers. Copies of both of these EIA’s are attached in Appendix C.
42. The assessments are being taken into account in the decision making process and actions will be taken to mitigate any impact. The proposals in the recommendation have been informed by the EIAs and take account of the requirements under the Equality Act 2010 and the equality duty.

## PROPERTY IMPLICATIONS

43. Eighteen Expressions of Interest were generated from the initial marketing, but only two developed into firm bids. Interests proposing development for alternative uses (most commonly housing) were not pursued further as they were in conflict with the council’s stated marketing limitations.
44. Outcomes required from the transfer of the site have also limited the potential for a capital receipt “best consideration” being defined by these outcomes rather than by highest price.
45. Within the site is a residential property known as Signal Point, which has been uninhabited for approximately five years. This was recently offered for sale, resulting in an offer of £295,000. The sale did not proceed, because the purchaser withdrew their offer. If, as is recommended in this report, Signal Point is not to be sold separately but to be included as part of the overall property as a operational asset. By this recommendation, the council could be foregoing a capital receipt of around £270,000. The level of the previous offer is unlikely to be achieved in current market circumstances.
46. In 2004, a small biological sewerage treatment plant was installed to ensure that discharged foul water complied with a national directive to improve the quality of marine and bathing water. Recent Environment Agency (EA) inspections have identified inadequacies in the system and the council is currently working with the EA and other partners, to agree a permanent solution. It is recommended that the management of this treatment system remains with the council until the issues have been addressed successfully. After this, the full responsibility should then be transferred to alternative management such as Southern Water or VBG CIC as appropriate.

47. There are a number of boundary issues that have been highlighted (partially as a result of the marketing of the site) that have yet to be resolved. The council has met with the relevant parties and most of the issues appear resolvable. Any transfer will be subject to the resolution of these issues. Therefore, the area of land shown as earmarked for transfer in Appendix A to the north of Undercliff Drive is likely to be reduced accordingly.
48. The successful bidder has also raised queries relating to a number of additional issues primarily to the repair and condition of buildings (which will be addressed through the proposed capital provision) and other elements of the Garden (such as the boundary dispute, and the sewerage treatment plant) and it is the council's intention to resolve these prior to transfer, if possible. It may be possible to transfer the Garden with some of these remaining outstanding and the bidder is working actively with council officers and Garden staff towards resolution.
49. As there are significant constraints on the sale of the site, it is recommended that any transfer should be on the basis of a 125 year ground lease. This will enable a transfer of a sufficient interest in the property to make it potentially viable to interested parties, whilst satisfying BIG that, as freeholder, the council retains its responsibility for compliance with the grant conditions.
50. It is also proposed that the tenant will have an option to renew the lease, at the end of the term, for a further 125 years on substantially the same terms provided that the covenants within the lease have been adhered to and the pursuit of the outcomes which have been identified as important to the council continues. In granting of ground leasehold interests such as this the provision for a renewal of a further 125 years is almost academic (in terms of timescale) as the principal is one of the outcomes and the additional term continues to enable this.
51. The proposed Heads of Terms (main elements of the agreement) with VBG CIC are attached in Appendix D

## CARBON EMISSIONS

52. Transfer of the ground leasehold interest to VBG CIC will remove the Garden from the council's carbon footprint, in respect of the council's carbon management plan. It will not, however, remove the carbon emissions from the Island's overall carbon emissions. VBG CIC is already making plans, however, to improve the Garden's energy efficiency and resources consumption. The table below summarises the usage on the site currently and the estimated reduction of emissions as a result.

GAS	Consumption	<b>558,545</b>	kWh
	Emissions	<b>103</b>	tCO2
	Cost	<b>17,783</b>	£
ELECTRICITY	Consumption	<b>256,950</b>	kWh
	Emissions	<b>139</b>	tCO2
	Cost	<b>32,210</b>	£



WATER	Consumption	1,786	m3
	Emissions	0.7	tCO2
	Cost	2,242	£

Total energy consumption	815,495	kWh
Total Carbon emissions	242	tCO2
Total utility costs	52,235	£
Estimated cost of CRC allowances (annual)	2,899	£

## OPTIONS

53. The options considered when making the recommendation in this report were:

**Option A To dispose of Ventnor Botanic Garden on a 125 year lease to the preferred bidder, on the terms detailed above and that the Cabinet agrees that the two lead Cabinet Members should agree any minor variations to the heads of agreement as may be required in the construction of the final legal documentation to achieve the transfer to VBG CIC.**

**Option B To retain the ownership and operational liabilities of the Garden**

## EVALUATION

### **Option A**

54. This option represents the recommended way in which the council could transfer the site to a successor body through a property disposal.
55. A disposal by way of lease would require BIG's consent with the preferred bidder required to deliver the outcomes set out in paragraph 2, outcomes (a) and (b), to satisfy the terms of the grant. The proposed limited support of up to £200,000 supports the council's obligation to achieve "best consideration", because a one-off investment in its asset will secure significant ongoing savings in the councils annual revenue budget.
56. This report and an outline of the preferred bidder's bid have been sent to BIG whose consent to the disposal, by way of long leasehold, has been secured.
57. Option A is recommended as the preferred way to safeguard the future of the Garden and to achieve a reduced operating subsidy from the council.

### **Option B**

58. This option retains the status quo, with the council subsidising the Garden with an unquantifiable but substantial future capital liability. The ongoing necessity for the council to achieve large savings in non-statutory activities would not only inhibit development of the Garden but could undermine its purpose and international status.
59. This option is not recommended.

## RISK MANAGEMENT

### **Option A**

60. This poses medium levels of risk option overall, for the council. Although it has the potential to reduce the council's financial risks through grant of a long lease, BIG would have to approve the choice of successor body. BIG has indicated that it approves of the preferred bidder, confirming that they are completely "compatible with the project purpose" (ie with the aims of the original grant to the site).
61. The grant of a lease at a peppercorn rent would not trigger a clawback by BIG but would still pose financial risk, because the council would be dependent on the preferred bidder to comply with the terms of the grant. If the successor body fails to deliver the required outcomes (which, if delivered in full, maintain compliance with the grant conditions), the council would be required to remedy the situation. This might result in additional and unforeseen costs, perhaps ultimately resulting in the Garden's return to council operation, for which there is no current budgetary provision. This risk would be mitigated by careful management of the lease, much of which will have to take place within the Community Wellbeing team and it will be essential to ensure that there is, post transfer, sufficient capacity in the Community Wellbeing Team to ensure the delivery of the outcomes and the success of the successor body in driving the Garden forward. A disposal enables the council to manage its financial risks, reducing the levels of subsidy which have been required to date, in line with corporate budget policy, and safeguarding the public assets through a clear transfer arrangement. The transparency of the process could also mitigate reputational risks, because the council has a clear set of outcomes that the preferred bidder must deliver. Through delivery of these outcomes by its tenant, the council is complying with its obligations to BIG and meeting the terms of its grant.
62. The setting aside of a provision is a straight cost of £200,000 with very limited prospect of there being any unspent monies after five years. With regard to pension costs there will be on-going liabilities falling on the Council but this will be less than they would be if the transfer does not go ahead.
63. Adopting this option would mean that the council is potentially exposed to the risk of the CIC failing at some point in the future. This risk is mitigated in two main ways; firstly as highlighted elsewhere in this report, the terms of the lease would mean that the Garden, at the point of failure, would be offered back to the council. This risk is further mitigated by the fact that the council's investment of £200,000 would not be lost and even if the CIC failed the council would still benefit from this capital expenditure.

### **Option B**

64. This option is a high risk option. It would involve high levels of reputational risk, because the council has been very public about its desire to engage with a successor body to permit devolved operation of the Garden. To reverse this decision could attract resident dissatisfaction, with the council being seen as indecisive and unable to deliver against its ambitions. This dissatisfaction would only deepen, with further funding reductions in the Garden's budget leading to an ongoing inability to maintain the Garden's collection, botanic status and tourist reputation. The likelihood of increased charging, particularly charging for entry, would also pose high levels of reputational risk.

65. This option also involves high levels of financial risk. The council is not able to prioritise funding the Garden to the current levels, and lower levels of funding will result a poorer offer on the site for visitors, which will in turn result in lower levels of income. This option would therefore fail to minimise the council's financial risks. This option would also pose operational risks, because an ongoing reduction in funding would have to affect staffing levels, which would have a negative impact on the remaining employees' ability to maintain standards and the botanic reputation of the Garden.
66. This option would not pose the financial risks associated with a discreet set-aside provision in the accounts of £200,000 to be spent within five calendar years of the date of transfer. The full pension liabilities would be met by the council. Nor would it incur the risks associated with admitting VBG CIC into the pension fund.

### RECOMMENDATION

**Option A** To dispose of Ventnor Botanic Garden on a 125 year lease to the preferred bidder, on the terms detailed above and that that Cabinet agrees that the two lead Cabinet Members should agree any minor variations to the heads of agreement as may be required in the construction of the final legal documentation to achieve the transfer to VBG CIC.

### APPENDICES ATTACHED

- [Appendix A](#) – Map showing the extent of the lease demise and premises relating to the discreet account for refurbishments
- [Appendix B](#) – VBG CIC bid document
- [Appendix C](#) – Equality Impact Assessments
- [Appendix D](#) – Proposed Heads of Terms

### BACKGROUND PAPERS

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